No. 15,220

United States Court of Appeals

For the Ninth Circuit

GLEN EARL GRIGG,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellee.

Appeal from Judgment of the United States District Court for the Northern District of California, Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Rules

Statutes

Texts

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STATEMENT OF PLEADINGS AND JURISDICTION.

This was an action for damages for personal injuries sustained by the appellant while operating his car on U. S. Highway 40 in an easterly direction toward Sacramento. Approximately one mile from Sacramento on a freeway the appellant was suddenly confronted with a large number of mules running up onto the freeway and his car collided with the mules, and the appellant was injured.

The complaint was originally filed by appellant in the Superior Court of the State of California, County of Sacramento, bearing docket No. 100994. (Trans. of Rec., pp. 9-14.) The suit instituted by appellant in the Superior Court named Harver Coon Gendel, Southern Pacific Company, a corporation, and First Doe to Sixth Doe, inclusive, as codefendants. The complaint alleged that the defendants, and each of them owned, possessed and controlled certain mules or horses in the immediate vicinity of U. S. Highway 40 in such a negligent, careless and reckless manner as to allow said animals to stray upon the highway and into the path of plaintiff's oncoming car so that the car of plaintiff was caused to be struck by one or more of said mules or horses. (Trans. of Rec., p. 11.) Service of process was effected upon Southern Pacific Company and that defendant filed an answer to the complaint. (Trans. of Rec., pp. 14, 15.) The appellant was unable to effect service of process upon Harver Coon Gendel in that he had removed himself from the State of California and could not be located.

Following the filing of the answer of defendant Southern Pacific Company and prior to the trial date of said action in the State Court, appellee, Southern Pacific Company, submitted itself to the jurisdiction of said Superior Court by procuring and taking depositions within the jurisdiction of that Court and by procuring the physical examination of the plaintiff within the jurisdiction of the Court, by stipulation to the use of the doctor's deposition in the jurisdiction

of the Superior Court, by the stipulation to the admission in evidence in said Superior Court of certain exhibits and documents. (Trans. of Rec., pp. 19-22.)

On November 15, 1955, the action came on for trial before the Superior Court, sitting without a jury, and after commencement of the proceedings the appellant was required to dismiss without prejudice the action against Harver Coon Gendel for the reason that he could not be served and was not within the jurisdiction of the Court. (Trans. of Rec., p. 6.) However, the appellant did not dismiss this action as to the six Does named as codefendants in the action. (Trans. of Rec., pp. 23, 24.) On November 15, 1955, after both the appellant and appellee had appeared in the Superior Court and announced their readiness to proceed to trial, and after stipulations and depositions had been exchanged between the parties under the jurisdiction of that Court prior thereto, and upon the dismissal without prejudice of the defendant Gendel, the Southern Pacific Company did file its motion to remove cause to the United States District Court, Northern District, Northern Division. The Superior Court thereupon suspended proceedings pending determination of said petition of removal. The appellant immediately thereafter filed his answer to the petition of Southern Pacific Company for removal of cause. (Trans. of Rec., pp. 23-26.) Said answer to the petition had attached thereto Exhibit "A", being a transcript of the proceedings had before the Superior Court on November 15, 1955, and which transcript is contained in this Transcript of Record pp. 27-41. The

proceedings before the Superior Court demonstrate that the only defendant dismissed without prejudice from the action was Harver Coon Gendel and that none of the fictitiously named defendants were dismissed. (Trans. of Rec., pp. 30-31.)

In addition to answering the petition for removal, the appellant filed a motion to remand civil action (Trans. of Rec., p. 16), together with supporting affidavits. (Trans. of Rec., pp. 17-23.) On December 5, 1955, the United States District Court entered its order denying appellant's motion to remand civil action to Superior Court. (Trans. of Rec., pp. 41, 42.)

At the time the action was pending in the state Superior Court the appellant had a motion before said Court to amend his complaint to increase the amount of damages prayed. When the defendant caused the action to be removed to the Federal Court, the Superior Court suspended the proceedings and did not determine the motion to amend the complaint. Subsequently, after the United States District Court had denied appellant's motion to remand cause, the motion to amend the complaint was renewed and the United States District Court granted said motion authorizing an amendment to the complaint increasing the prayer to $70,000.00. (Trans. of Rec., pp. 42, 43.) The action was thereupon set for trial before the Court without jury, commencing Tuesday, March 6, 1956, and said trial continued from day to day, and the appellant completed his case in chief on March 8, 1956. Thereupon the defendant Southern Pacific Company moved to dismiss the action and, thereupon,

the Court did enter its order dismissing the action upon the merits and entered judgment thereupon, following the submission of findings of fact and conclusions of law. (Trans. of Rec., p. 48.) A motion for new trial was made and denied. (Trans. of Rec., p. 52.)

A. Jurisdiction Upon Which the Case Was Removed to the United States District Court.

The jurisdictional grounds upon which the case was removed from the state Court to the federal Court was that of diversity of citizenship. (Trans. of Rec., pp. 7, 8.) The jurisdiction which the United States District Court impliedly found to exist (by virtue of its denial of appellant's motion to remand cause to the Superior Court) was impliedly diversity of citizenship.

B. Jurisdiction of United States Court of Appeals.

The United States Court of Appeals has jurisdiction to hear the appeal in this matter stemming from the statutory grant of jurisdiction contained in 28 U. S. Code, Sec. 1291. The United States Court of Appeals further has jurisdiction to determine the jurisdiction of the United States District Court and the propriety of the denial of the motion to remand the case to the state Court under Sec. 1291, 28 U. S. Code Annotated. Further, there have been innumerable decisions holding that the United States Court of Appeals has jurisdiction and is required to determine jurisdiction of all cases before it. In *Brooks v. Laws,* 208 Fed. 18, 92 U.S. App. D.C. 367, it was stated that

every Court has jurisdiction of every phase of a proceeding to consider the jurisdiction of the Court or of inferior Courts. In *Venner v. New York Central Railway,* 293 Fed. 373, affirmed in 46 Supreme Court 444, 263 U.S. 127, the United States Court of Appeals determined the question of the jurisdiction of the United States District Court to hear and determine a cause and found that the lower Court did not have jurisdiction to hear the matter and ordered the case remanded to the United States District Court with an order for said Court to remand the cause to the state Court from which it had been removed. Similar rulings have been made in the following cases:

South Carolina State Ports Authority v. Seaboard Airline Railroad Company, et al., 124 Fed. Supp. 533;

Thompson v. Standard Oil Company of New Jersey, 67 Fed. 2d 644;

Green v. Green, 218 Fed. 2d 130;

Schroeder v. Freeland, 188 Fed. 2d 517;

Mason v. Webb, 142 Fed. 2d 584; certiorari denied, 65 Supreme Court 588, 323 U.S. 747.

C. This Action Was Improperly Removed From the State Court to the United States District Court and the District Court's Order Denying Appellant's Motion to Remand Was Erroneous.

1. Diversity of Citizenship Did Not Exist.

The complaint filed in the Superior Court, Sacramento County, asserted a citizenship of the defendant Southern Pacific Company as of the State of Delaware and asserted a domiciliary of the defendant Harver

Coon Gendel as of the State of California. The complaint did not assert the citizenship of the plaintiff, nor the citizenship of First Doe to Sixth Doe, inclusive, defendants. The recorded transcript of the proceedings, at the commencement of the trial in the State Court on November 15, 1955, demonstrate that the plaintiff dismissed without prejudice as against defendant Gendel only, but the six fictitiously designated defendants remained in the case and appropriate charging allegations had been made against all the defendants. (Trans. of Rec., pp. 30, 31.) The transcript before the Superior Court likewise demonstrates that 30 days prior to Nov. 15, 1955, the plaintiff notified the defendants that they were unable to serve Gendel and that the action would be dismissed without prejudice as against that defendant. (Trans. of Rec., p. 35.) This statement presented to the Superior Court was not challenged by the defendants. The record in the Superior Court further demonstrates that the defendant Southern Pacific Company had conceded to the jurisdiction of the Court and waived right of removal by availing itself of the processes of that Court through the taking of depositions, the submission of stipulations as to production of evidence, documents and other matters.

Further, the record before the Superior Court demonstrates that, at said hearing, counsel for appellant requested the Court to continue the matter for 30 days for the purpose of serving process upon the fictitiously designated defendants. (Trans. of Rec., p. 38.) Further, the proceedings before the Superior Court

on Nov. 15, 1955, demonstrates that counsel for appellant moved the Court to be relieved of its dismissal of the defendant Harver Coon Gendel without prejudice on the grounds of surprise in view of the conduct of counsel for defendant who had previously stipulated to certain matters indicating their submission to the jurisdiction of the Superior Court. (Trans. of Rec., p. 40.)

The affidavit of Charles J. Miller, one of the attorneys for appellant, accompanying the motion to remand cause to the Superior Court demonstrates the numerous stipulations, conduct and submission by defendant Southern Pacific Company to the jurisdiction of the Superior Court, which would estop them from petitioning for removal on the day of the trial. (Trans. of Rec., pp. 19 through 22.)

In *Grasso v. Butte Electric Railway Co.* 217 Fed. 422, a plaintiff instituted a suit in a state Court naming the railroad company as a defendant and fictitiously designating Does as codefendants and asserting that defendants and all of them had negligently conducted themselves. The complaint on its face demonstrated that a diversity of citizenship existed between the plaintiff and the defendant, Butte Electric Railway Co. However, the citizenship of the fictitiously designated defendants did not appear on the face of the complaint. The defendant Butte Electric Railway Co. petitioned to remove the case to Federal Court and the said petition was granted. On appeal, the United States Court of Appeals held that the United States District Court was without jurisdiction because of the

fact that it did not appear affirmatively from the record or the pleadings that the citizenship of all of the defendants (including the fictitiously designated defendants) was diverse from that of the plaintiff. The United States Court of Appeals thereupon remanded the cause to the United States District Court ordering said Court to remand the cause back to the state Court on the grounds that jurisdiction did not exist in the United States District Court.

In order to bring oneself into the jurisdiction of the United States District Court upon the grounds of diversity of citizenship, it is essential that diversity must exist as to all parties whether liability for tort is joint and several and the plaintiff may elect to sue adverse claimants jointly and, if it does not affirmatively appear from the record that all parties codefendant had diverse citizenship as to the citizenship of the plaintiff, the Federal Court is without jurisdiction. In this regard, see *Dollar Steamship Lines v. Merz,* 68 Fed. 2d 594; *Matthew v. Zoppin,* 32 Fed. 2d 100, and *Heintz v. Ohio Casualty Insurance Co.,* 112 Fed. Supp. 199.

It is absolutely essential that diversity of citizenship be ascertained from the allegations in the complaint and the United States District Court is not at liberty to speculate as to the citizenship of parties so that, in the event the pleadings do not disclose a diversity of citizenship as to all parties, the District Court is without jurisdiction to entertain the case. In this regard, see *Kaske v. Rothert,* 133 Fed. Supp. 427, *Heintz v. Ohio Casualty Insurance Co.,* supra, *Schatte*

v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada, 84 Fed. Supp. 669, affirmed in 182 Fed. 2d 158, re-hearing denied 183 Fed. 2d 685, certiorari denied 71 Supreme Court 64, 340 U.S. 827, re-hearing denied 71 Supreme Court 194, 340 U.S. 885.

The pleadings in the action upon which the United States District Court was caused to determine the issue of diversity of citizenship demonstrated, that at the time of the petition for removal, the appellant was suing the Southern Pacific Company and six fictitiously designated Does and had charged all the defendants with negligence and sought relief from all defendants. The citizenship was only asserted as to the defendant Southern Pacific Company and the defendant Gendel. No citizenship was asserted in the complaint as to the plaintiff or the six fictitiously designated Does. Further, the record of the proceedings before the Superior Court at the time the petition for removal was made demonstrates that as of that time a dismissal had been entered only as against the defendant Gendel and that upon the basis of surprise the appellant requested leave to withdraw the dismissal and continue the cause for the purpose of serving said defendant. Admittedly, said defendant (by the petition to remove) was a citizen of California.

Under the circumstances, therefore, upon the appellant's petition for remanding of cause, the United States District Court should have remanded the cause to the Superior Court on the basis that the record does

not disclose an adequate diversity case and under the doctrine of *Kaske v. Rothert,* supra, it was not a proper case of removal.

It is submitted upon the basis of the authority herein stated that the within action was improperly removed from the state Court to the United States District Court and that jurisdiction does not exist and that the cause should be remanded to the United States District Court with instructions and order to remand said cause to the Superior Court of the State of California.

For further authority on this proposition see 28 U.S. Code Annotated, Sec. 1332(a) and Federal Rules of Civil Procedure, Rule 8a (1).

2. Appellee Did Not Make a Timely Petition of Removal and Further Submitted to the Jurisdiction of the Superior Court and Was Estopped to Remove Cause to Federal Court.

A petition for removal from state Court to United States District Court must be made timely. The petition of Southern Pacific for removal of cause asserts that it was not until the defendant Gendel had been dismissed that the occasion arose upon which they could move.[1] If this were the only basis for the defendant's assertion of the timeliness of their petition, it is apparent that the record does not bear them out in that the affidavit of Charles J. Miller (supporting motion to remand cause) demonstrates that defendant Southern Pacific Company was notified more than

[1]It is to be noted that the petition asserts that there was a dismissal as to all the defendants, but the record before the Superior Court demonstrates that that allegation is incorrect. (See Trans. of Rec., pp. 30 and 31.)

thirty days prior to the trial date that a dismissal would be entered as to the defendant Gendel. (Trans. of Rec., pp. 21 to 22.) This assertion of fact in the Miller affidavit was never controverted at any time by the Southern Pacific Company. Further, the affidavit of Miller demonstrates the numerous stipulations and occurrences in the record adequately substantiating the point that the Southern Pacific Company had submitted itself to the jurisdiction of the Superior Court, having availed itself of the remedies, jurisdiction and authority of that Court. Further, since the petition for removal of Southern Pacific Company is based upon the allegation that on November 15, 1955, the occasion first arose for the removal on the basis that *all* defendants other than Southern Pacific had been dismissed, the petition for removal itself is insufficient to show a timeliness of removal or the right to removal since the record demonstrates that all of the defendants were not dismissed. Thus, on the face of the petition for removal itself, it is disclosed that the petition was improper and insufficient since there had not been a dismissal of all codefendants other than Southern Pacific Company.

This Court's attention is invited to *Powers v. Chesapeake,* 169 U.S. 92, 18 Supreme Court 264. In that case the language demonstrated that the petition for removal must be filed at the earliest time that the cause became removable and before any steps have been taken in defense of the action. The affidavit of Miller in the instant case demonstrates that the defendant took numerous steps in defense of the action,

including stipulations to use of certain evidence before the Superior Court.

It is submitted that there was not a timely petition for removal of cause and that the submission by defendant Southern Pacific to the jurisdiction of the Superior Court estopped said defendant from petitioning to remove and that, therefore, the United States District Court was also without jurisdiction to entertain the suit.

STATEMENT OF FACTS.

A. Admitted or conceded facts.

The following facts are admitted or conceded as is indicated in the findings of fact and conclusions of law executed by the Court on March 30, 1956, and found in Trans. of Rec., pp. 46 and 47.

1. That certain horses or mules were *negligently and carelessly permitted to stray upon U. S. Highway 40* one mile west of Sacramento, California, into the path of plaintiff's oncoming car and plaintiff was caused to be struck by one or more horses or mules, damaging said car of plaintiff and causing plaintiff to sustain certain personal injuries. (Finding VII.)

2. That at the time and place when plaintiff's automobile struck one or more of the horses or mules the plaintiff was operating his car with reasonable care and was not guilty of contributory negligence in the operation of his automobile. (Finding VIII.)

Thus, there is no dispute nor any reason to refer to transcript evidence as to the fact that the mules were

negligently caused to be allowed to stray upon U. S. Highway 40 and that plaintiff's car was caused to collide with them and that plaintiff was injured, and that plaintiff was not guilty of any negligence on his part. Therefore, no further reference to evidence will be made by virtue of the admissions contained in the findings of fact.

B. Disputed Facts.

The disputed facts in the case are as follows:

1. Did the Southern Pacific Company maintain its stock corrals in Sacramento in a reasonable fashion and supervise same in a reasonable and prudent manner?

2. Did Southern Pacific Company owe a duty to the public so long as said mules were held in the Southern Pacific stock corrals?

3. Did H. L. Coon unload and secure the horses and mules in the Southern Pacific stockyard exclusive of any assistance or possession of Southern Pacific Company, and did the Southern Pacific Company maintain any supervision over said animals? Further, could the Southern Pacific Company delegate its duty to supervise and possess said animals in its corrals in a reasonable and prudent fashion so as to relieve itself of any further responsibility in regard to said animals or injury which they might cause?

C. General Statement of the Evidence.

The evidence disclosed that on December 9, 1954, 57 mules were shipped from Texarkana, Texas, consigned to H. L. Coon. That 29 of said animals were loaded

in stockcar AT29117 and 28 head of animals were loaded in stockcar AT27608 routed on the Texas-Pacific Railway, Atchison, Topeka and Santa Fe Railway, Southern Pacific Railroad and, ultimately, from Sacramento to Santa Rosa, by the Northwest Pacific Railway. Plaintiff's exhibits in evidence 16, 17, 18; Trans. of Rec., pp. 287 to 294.)

The record discloses that the animals arrived in Sacramento on December 16, 1954, at 10:00 o'clock A.M., at the corrals of Southern Pacific Company and that the same were then unloaded and placed in the corrals by Mr. H. L. Coon, the consignee, assisted by Mr. Anthony Perine (a Southern Pacific employee whose duties included overseeing Southern Pacific's stockyard and carrol at West Sacramento) (Trans. of Rec., pp. 114 to 120; see also plaintiff's exhibit 11 in evidence, being the stockbook of Southern Pacific Company).

The evidence demonstrates that following the unloading of the mules and placing of same in the Southern Pacific corral, Mr. Anthony Perine, in charge of said corral, notified his superior officers of the Southern Pacific Company that the animals were in the corral and made an entry in the stockbook of the Southern Pacific Company concerning same. (Trans. of Rec., pp. 118-119; plaintiff's exhibit 11 in evidence.)

After the horses and mules had been unloaded and placed in the corral by Mr. Coon, under the supervision and observation of Mr. Perine, Mr. Perine saw that the corral gates were closed and secured and then went down to his company's office and reported the

arrival of the livestock in the Southern Pacific corral. (Trans. of Rec., pp. 136, 137.)

The following morning, December 17, 1954, Mr. Perine, in discharge of his duties as overseer of the corrals of the Southern Pacific Company, went to the West Sacramento corrals around 10 o'clock in the morning and was there approximately fifteen minutes. At that time he observed that all of the horses and mules which had formerly been in the corral had been removed from the corral and were being grazed and fed outside the corrals alongside a public road. Only one person was there containing the animals—to-wit, Mr. Coon. Mr. Perine did not request Mr. Coon to put the animals back into the corral and did nothing to see that the animals were properly restrained so as not to escape along the public road and endanger persons or property. (Trans. of Rec., pp. 122-128.) Again, at about 4:00 o'clock P.M. of December 17th, approximately two hours before the mules escaped onto the highway, Mr. Perine again visited the Southern Pacific corral in West Sacramento and again observed that all of the horses and mules were still outside the corral and were being fed and grazed by Mr. Coon, and no-one else was there to assist him in containing the livestock, and that said livestock was grazing alongside and on a public road. Again, at this time Mr. Perine did nothing to cause the animals to be returned to the corral, although he testified that part of his general duties was to feed and water livestock. (Trans. of Rec., pp. 128, 129.) Mr. Perine also testified that, at both 10:00 A.M. and 4:00 P.M. on Decem-

ber 17th, the date the animals escaped and were allowed to roam upon U. S. Highway 40, the Southern Pacific stockyard corrals were very muddy. (Trans. of Rec., p. 135.)

Mr. Perine testified that, at 8:00 o'clock P.M., on December 17th, he was notified by Mr. McKenzie, chief waybill clerk of Southern Pacific Company, that the mules had escaped from the corral. The stock-book of the Southern Pacific Company, which is plaintiff's exhibit No. 11 in evidence, demonstrates that an entry was made in said stock-record book that said mules and horses had "escaped from the Southern Pacific corral." Mr. McKenzie advised Mr. Perine to phone the chief dispatcher of Southern Pacific Company regarding the escaped horses and mules. Mr. Perine did notify the chief dispatcher and, after said conversation, Mr. Perine did thereupon go out and make a search for the escaped horses and mules. While he was out searching for said animals, he met a Mr. Duke, who was also employed by Southern Pacific Company and who was Mr. Perine's assistant in charge of the corrals, and Mr. Duke and Mr. Perine searched for the escaped animals. (Trans. of Rec., pp. 142, 143.) Mr. Perine testified that he and Mr. Duke, the following morning, found certain of the horses and mules roaming around the corral and that they did put them back into the corral and locked the gate. (Trans. of Rec., p. 144.) After putting the horses and mules back in the corral, Mr. Perine and Mr. Duke made a count of the animals and discovered all were present except two which had been killed the

night before. In the Southern Pacific stock-book kept by Mr. Perine, which is plaintiff's exhibit No. 11 in evidence, the following entry was made by Mr. Duke, to-wit:

> "December 18, 1954, 5:00 P.M.: Consignee H. L. Coon. Horses escaped from corral, ran on Yolo freeway and two killed by autos. Turned over to Reduction. One had bad lacerations on the front shoulder when corralled. Signed 'R. D.' "

Mr. Perine stated that the dead mules, which had been killed when struck by Mr. Grigg's car, were located by him and that he phoned a reduction plant and notified the plant that he was a Southern Pacific employee and asked the reduction plant to pick up the mules and take them to the reduction plant for the Southern Pacific Company. (Trans. of Rec., p. 157.)

Mr. Perine testified that on December 18th, around 4:00 P.M. (which was the day following the accident), he and Mr. Coons reloaded the remaining horses and mules from the Southern Pacific corral into the box-cars and that the animals were shipped out to Petaluma. Actually, the records and waybills of lading demonstrate that the animals were shipped to Santa Rosa. (Trans. of Rec., pp. 148, 149; plaintiff's exhibits in evidence Nos. 17 and 18.)

Mr. Sigmund A. Fisher testified that he was freight agent of the Southern Pacific Company at Sacramento and his duties included general supervision of the stockyards of the company in West Sacramento and inspection of the corrals. That, prior to the accident, he had inspected the corrals and knew that the

corrals were fastened shut by a sliding board latch, but that he does not recall any chains or locks being on the gates of the corral. (Trans. of Rec., pp. 281-285.) Mr. Fisher testified that the records of the Southern Pacific Company demonstrated that these two carloads of horses and mules, the subject matter of this suit, were shipped, with the shipment originating with the Texas-Pacific Railway in Texarkana, Texas, and they were routed into Sweetwater, Texas, and from there on the Santa Fe Railroad to Bakersfield and were taken over at Bakersfield by Southern Pacific Railroad and shipped to Sacramento and, subsequently, to Santa Rosa, California. (Trans. of Rec., pp. 287-290.) Mr. Fisher testified that the Southern Pacific Railroad received payment for the shipment and, ultimately, under tariff regulations prorated back to the other carriers their pro rata share. That, Southern Pacific Company was paid for shipment of the animals from Bakersfield, California, through to Santa Rosa, California. (Trans. of Rec., pp. 291, 293.) Mr. Fisher testified that the records indicated that when the horses and mules were transported from Sacramento to Santa Rosa they were carried upon the same railroad cars in which they had arrived in Sacramento on December 16. (Trans. of Rec., pp. 294-295.) He also testified that plaintiff's exhibits in evidence Nos. 17 and 18 (being the waybills of lading) were the only documents involved customarily in such a shipment. On the back of plaintiff's exhibit No. 18, there appears a receipt for the horses and mules in Santa Rosa, California. (Trans. of Rec., p. 303;

plaintiff's exhibit No. 18.) Mr. Fisher also testified that in the past, it had been the custom of the Southern Pacific Company and Mr. Coon, when he receives shipment of horses and mules at Sacramento, to hold them two or three days in the Southern Pacific corrals and then divert them to Santa Rosa or Petaluma. (Trans. of Rec., p. 313.) He also testified that he had in the past observed a makeshift wire fence in the vicinity of the corral, but that he did not know how it got there. (Trans. of Rec., p. 316.)[2]

Mr. Fisher also testified that there were charges shown on the waybill of lading indicating feeding by a railway company at one station where the animals were rested, but that the rest of the stations are blank as to whether or not a charge was made for feeding. He further testified that the waybills of lading demonstrated that no one accompanied the animals on the trip and that no one had signed a release to the railroad company of liability in accompanying the animals. (Trans. of Rec., pp. 320, 321.) He further testified that no receipt had been signed by Mr. Coon for the animals when they arrived at Sacramento. (Trans. of Rec., p. 321.) He further testified that, when animals are ultimately delivered, the company secures a receipt for delivery of them. (Trans. of Rec., p. 322.) The first receipt signed for these animals was signed in Santa Rosa, California. (Plaintiff's exhibits Nos. 17 and 18 in evidence, being the waybills of lading.)

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[2]This makeshift wire fence is the fence referred to in the testimony of Mr. Courtney and Mr. Houck, to be referred to hereinafter.

Mr. Don Courtney, who was a stockman residing in the general vicinity of the Southern Pacific corrals in West Sacramento, and not an employee of Southern Pacific Company, testified that he had been in the cattle and horse business for ten years and was generally familiar with the habits and general inclinations of such animals. (Trans. of Rec., pp. 238, 239.) He testified that at approximately 10:30 or 11:00 A.M. of December 16th, shortly after the horses and mules had arrived at Sacramento, he observed the horses and mules inside the Southern Pacific stockyard and that the gates were closed by a sliding wooden board latch. (Trans. of Rec., p. 239.)

Mr. Courtney testified that, on December 17th, he brought a load of feed for Mr. Coon to the Southern Pacific stockyard and that the feed was dumped outside of the corral because it was handier to feed the animals on the outside because it was a little muddy inside the corral. (Trans. of Rec., pp.240-241.) He testified that the mud was 8 to 10 inches deep in the corral and there were 50 to 55 head of horses and mules in the corral. He testified that when he returned to the corral all of the horses and mules were outside the corral and generally in the vicinity of E Street, Broderick, California, between 7th and 8th Streets, which is a public street. He testified that there was a fence between the area where the animals were being fed and the public street, but that it was a poor fence, consisting of two wires stretched in the area and that, if the horses and mules wished to cross it, they could. (Trans. of Rec., pp. 242-243.)

Mr. Courtney testified that after the hay had been placed outside the corral and the horses and mules were grazing there, he had gone to Auburn, California, and returned shortly after dark on December 17th and learned that certain horses and mules had escaped. He testified that, when he got back that evening, they were putting the horses and mules back in the corral.

Mr. Courtney testified that he knew Mr. Coon had a practice of bringing horses and mules to Sacramento and holding them in the Southern Pacific corral and would subsequently ship them out by railway to other places. (Trans. of Rec., p. 246.) He further testified that Coon customarily held the horses and mules in the Southern Pacific corrals for three or four days or a week and then shipped them out again by Southern Pacific Company railroad. (Trans. of Rec., pp. 248, 249.) He testified that there was a makeshift wire fence on the Southern Pacific property outside the corral extending from the corral out and along E Street and back to the corral; that it was a two-wire fence in some places and a one-wire fence in other places, and that the fence had been put up by some horsetraders some five years ago and had existed on the Southern Pacific property for some five years, and that Mr. Coon had patched it up in places. (Trans. of Rec., pp. 256-260.)

Pursant to stipulation contained at page 266 of the transcript of record it was stipulated that there was no written authority in the files of Southern Pacific authorizing Mr. Coon to feed the horses and mules. It was further stipulated and admitted by

counsel for Southern Pacific Company that Mr. Coon paid the freight of the entire shipment in Santa Rosa and that Mr. Coon signed a written receipt for the shipment in Santa Rosa. (Trans. of Rec., pp. 266, 267.)

Mr. George Houck, the state highway patrol officer who investigated the accident and the horses and the mules, and who examined the Southern Pacific corral the following morning, testified at length concerning the incident on the night of the happening of the accident. Since this evidence pertains primarily to the issue of whether or not Mr. Grigg was guilty of contributory negligence, a resumé of that portion of his testimony will be disregarded in view of the findings of fact of the court finding that Mr. Grigg was not guilty of contributory negligence. The testimony of Officer Houck pertaining to his inspection of the corral will be his only testimony reviewed herein.

Officer Houck testified that, the day following the accident, when he went to the Southern Pacific corral he saw that part of it was enclosed by wire and there were not too many wires, some of the wires sagged somewhat. (Trans. of Rec., p. 185.) Officer Houck then marked on plaintiff's exhibit No. 14, the highway map, the location of the Southern Pacific corral in conjunction with U. S. Highway 40 and indicated the various approaches from the corral to the highway, demonstrating that there were numerous avenues from the corral to the highway upon which the mules could move to reach the highway. (Trans. of Rec., pp. 200-207.)

The testimony of witnesses Lillian and Malverne Spansel is omitted from this recitation of facts as not being pertinent to the legal issues presented by this appeal for the simple reason that their testimony relates to the actual happening of the accident on Highway 40. Their car was travelling to the right and immediate rear of the Grigg car and they observed the Grigg car slow down and strike the mule and they subsequently also were confronted with mules on Highway 40 and struck mules themselves. They have no knowledge of the corrals of the Southern Pacific Company or of the facts concerning the custody of the mules. For that reason their testimony is not elicited in this brief.

Plaintiff's exhibits Nos. 17 and 18 are the waybills of lading pertaining to the shipment of the two cars of livestock. One waybill pertains to one freight car of livestock and the other waybill pertains to the other shipment of livestock. On the bottom of the waybills there is stated the various interim substations where the animals were taken from the cars, rested and fed in accordance with both the Federal statutes and the California Agricultural Code. These laws require livestock in shipment to be removed from cars every 28 to 36 hours for rest and feeding. The schedule contained on the two waybills demonstrates the following:

Plaintiff's Exhibit No. 17—Waybill, Freightcar No. A. T. 27608, was loaded at 2:00 P.M. on December 9, 1954, in Texarkana, Texas, with 28 head of mules. The feeding and rest record shows:

FEEDING AND REST RECORD

	Unloading Record			Reloading Record		
Place	Date	Time	Count	Date	Time	Count
Sweetwater, Tex.	12/11/54	12:30 a.m.	28	12/11	7:15 a.m.	28
Winslow, Arizona	12/12	3:30 p.m.	28	12/12	11:00 p.m.	28
Barstow, Calif.	12/14	3:20 a.m.	28	12/15	2:10 a.m.	28
Sacramento, Calif.	12/16	10:30 a.m.	28	12/18	4:30 p.m.	27

Plaintiff's Exhibit No. 18—Waybill. Freight car No. AT29117 was loaded at 2:00 P.M. on December 9, 1954, at Texarkana, Texas, with 29 head of mules. The feeding and rest record shows:

FEEDING AND REST RECORD

	Unloading Record			Reloading Record		
Place	Date	Time	Count	Date	Time	Count
Santon, Tex.	12/10	11:25 p.m.	29	12/11	7:25 a.m.	29
Winslow, Ariz.	12/12	3:30 p.m.	29	12/12	11:00 p.m.	29
Barstow, Calif.	12/14	3:20 a.m.	29	12/15	2:10 a.m.	29
Sacramento, Calif.	12/16	10:30 a.m.	29	12/18	4:30 p.m.	28

The feeding and rest records of the waybills thus show that both carloads of animals were loaded at Texarkana, Texas, at 2:00 P.M., Thursday, December 9, 1954. They then traveled to Sweetwater, Texas, some 419 miles, arriving there on Saturday, December 11 at 12:30 A.M. They were rested about seven hours and were reloaded. They then traveled from Sweetwater, Texas, to Winslow, Arizona, some 708 miles distant, arriving there on Sunday, December 12th at 3:30 P.M. They were rested in Winslow, Arizona, for about eight hours and reloaded. They then traveled to Barstow, California, some 435 miles distant, arriving there on Tuesday, December 14, at 3.20

A.M. They were rested in Barstow about twenty-three hours and were reloaded. *The two waybills (Plaintiff's Exhibits 17 and 18) demonstrate on their face that the destination point was Santa Rosa, California.* The animals departed Barstow, California, on Wednesday, December 15 at 2:10 A.M. and arrived in Sacramento on Thursday, December 16, at 10:30 A.M. They were unloaded in Sacramento after the elapse of thirty-two and a half hours from the time of leaving Barstow which is 412 miles in distance from Sacramento. They were reloaded in Sacramento on Saturday, December 18, at 4:30 P.M. in the same railway cars in which they had arrived and the certificate on the back of Plaintiff's Exhibit No. 17 indicates that the animals were receipted for in Santa Rosa on December 22, 1954.

Defendant's Exhibit "A", at page 13, reads in part as follows:

> "Feeding, Resting and Watering Livestock.
>
> Agents will make notation on waybill, whether carload or less-than-carload shipments, of day and hour livestock is loaded in cars.
>
> The provisions of the laws with respect to resting, watering and feeding of livestock enroute, must be observed by conductors as well as agents and carried out, regardless of objection made by owner or his agent accompanying in charge; and the actual expense incurred by Southern Pacific Company (Pacific Lines) in effecting the resting, feeding and watering, as provided by law, will be added to the transportation charges and made collectible in the same manner. It will be the con-

ductors' duty to observe originating point and date and hour of loading, determining therefrom at what point rest will be necessary in order to conform to the law, and be guided accordingly."

SPECIFICATION OF ERRORS.

The appellant states, as his specifications of errors committed by the lower Court in this case, the following:

1. That the lower Court was without jurisdiction in this case and that appellant's motion to remand cause to the Superior Court of California should have been granted.[3]
2. The judgment is against the law in that the effect of said judgment provides that an owner of land is not required to exercise reasonable care in the use of his land so as to protect third parties from being injured by said use.
3. The judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, has no duty to exercise reasonable care to see that livestock held in said carrier's pens or corrals do not escape or otherwise injure third parties.
4. The judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can delegate its duty to restrain said livestock in said carrier's pens or corrals, and by so delegating said duty, the said carrier is relieved of all liability to third

[3]This specification of error having been fully covered in the first portion of the brief.

parties for injuries suffered as a result of said livestock escaping from the carrier's corrals or pens.

5. The judgment is against the law since the effect of the judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can hold said livestock in said carrier's pens or corrals for rest and feed and/or trans-shipment, and that said carrier can absolve itself from any and all liability for injuries caused to third parties by said livestock by simply authorizing the consignee of the livestock to feed, water and restrain the animals.
6. The judgment is against the law since the effect of said judgment is to provide that a common carrier, engaged in the transportation of livestock for hire, can allow livestock, shipped by said carrier, to be placed in said carrier's corrals by the consignee and, even though said carrier has express knowledge that the consignee is not properly restraining said livestock, the carrier is not liable to members of the general public who are injured when said livestock escapes from the carrier's corrals or pens.
7. The Findings of Fact are not supported by the evidence.

ARGUMENT.

I. AN OWNER OF LAND IS REQUIRED TO EXERCISE REASONABLE CARE IN THE USE OF HIS LAND SO AS TO PROTECT THIRD PARTIES FROM BEING INJURED BY SAID USE.

As a general principle of law the land owner or possessor of land owes certain affirmative duties of care with respect to activities or conditions maintained upon the land to persons who come upon the land or to persons who are injured outside of the land as a result of the conditions maintained upon the land. This general rule of law pertains also to third parties who are allowed to use the land of the owner. Restatement of Torts, Sec. 318, provides:

> "If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so as to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor
>
> (a) knows or has reason to know that he has the ability to control the third person, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control."

It is submitted that all of the requirements of this section are met by the facts in the case before the Court. The land was owned and in the possession and control of Southern Pacific Company upon which was located the corrals and where the horses and mules were being fed. The defendant's agent, Mr. Anthony Perine, was present and he knew or should have

known that allowing fifty mules to be fed outside the corral along a public highway was such a hazard that he had the right to direct Mr. Coon to place the animals back in the Southern Pacific corrals or to remove them from the property of Southern Pacific Company. As the danger was apparent, he knew or should have known of the necessity and opportunity of exercising this control as an agent for the owner of the land.

In this regard the Court's attention is respectfully cited to the following cases applying the rule:

Honaman v. Philadelphia, 332 Penn. 535, 185 Atlantic 750;

Stevens v. Pittsburgh, 129 Penn. Super. 5, 198 Atlantic 655.

In other cases in which an owner of property or land allows another third party to use this land or property in such a way as said use is negligent, causing injuries, the courts have held that the owner of the land or property, as well as the third party who is negligent, are both jointly liable for such damage.

In *Porter v. Thompson,* 74 Cal. App. 2d 474, certain cattle were being auctioned on land and auctioneer yards owned by defendant. A cow jumped over a barrier into the lap of a spectator at the auction yard, injuring the plaintiff. The Court held that both the defendant owner of the land and the auctioneer had the joint duty to exercise reasonable care to see that proper fences and safeguards were provided to protect the public.

In *Pschomy v. Brooks Market,* 60 Cal. App. 2d 158, 140 Pac. 2d 431, and a subsequent decision in hearing said case in 79 Cal. App. 2d 556, 180 Pac. 2d 933, an owner of property was held liable for a use of the property by a prospective future tenant which use by said prospective tenant caused injury to a third party. In the *Pschomy* case the owner of the property was sued. He had permitted a future tenant of his property (someone who had not yet entered upon a lease and had not yet entered upon the property but was going to open a store on the property) to erect a sign upon the property. This was a small sign standing on an iron grill on the sidewalk with a circular ring in the bottom of the sign. A young lady walking along the sidewalk caught her foot in the irongrill work and fell and hurt herself, and filed suit against the owner of the property. The Court established the law that the owner of the property was liable for the negligent use of his property in that he had knowledge of the existence of the negligent conduct and failed to do anything to remedy the situation.

The Southern Pacific Company, through its agent and servant, Mr. Perine, knew that their property and corrals were being negligently used by Mr. Coon at 10:00 A.M. and 4:00 P.M. on the day that the animals escaped in that Mr. Perine saw that all 50 of the animals had been removed fom thec orral by Mr. Coon and were being fed outside of the corral along the public road. Mr. Perine, at 10 o'clock in the morning and at 4:00 P.M. in the afternoon of the day of the accident, observed this condition and did

nothing whatsoever to cause the danger to be removed by replacing the mules back in the corral. Under the doctrine of *Pschomy v. Brooks Market* both Southern Pacific Company and Mr. Coon would be liable for this negligent use of the property.

For similar holdings in other jurisdictions see *Conrad v. Cloves,* 93 Indiana 476, 47 Am. Rep. 388; *Smith v. Tennessee Railroad Association of St. Louis,* 160 Southwest 2d 476; also on this subject matter see 65 Corpus Juris Secundum, Negligence, Section 92.

It was stipulated in the record that Southern Pacific Company owned the land upon which the wood corral was located and owned the land adjacent to the corral and bordering upon E Street in Broderick, West Sacramento. The record demonstrated that their agents in charge of the corral had observed all of the mules and horses outside the corral and along E Street at both 10:00 A.M. and 4:00 P.M. on the day of the accident and within two hours thereafter the mules were on the West Sacramento freeway and were struck by the cars of Mr. Grigg and Mr. Spansel. Therefore, the agents of Southern Pacific knew that a dangerous condition had been created and was in existence upon their employer's property and that no steps of any kind were taken by said Southern Pacific employees to abate the dangerous condition by placing the mules back in the wooden corral. Further, upon learning of the escape of the mules, the Southern Pacific employees did go out and seek to round up and return the mules to the wooden corral and, in fact, the following morning succeeded in returning all of said

mules to the wooden corrals. Further, that the two mules that were killed were ordered sent to a reduction plant in the name of the Southern Pacific Company by Southern Pacific employees. Further, the stock record book of Southern Pacific Company demonstrates that an entry was made following the event, to the effect that the mules "had escaped from the corrals and got upon Highway 40".

It is submitted, therefore, that under the law herein stated the Southern Pacific Company as an owner of land allowed their land to be used with their express knowledge and consent in a dangerous manner and in result thereof fifty mules were allowed to escape and roam in the vicinity of streets and highways and did stray upon a freeway heavily traveled and did cause injury to not only the appellant herein but to other parties. That under the authorities herein cited this negligent conduct is chargeable to the Southern Pacific Company as well as to the third party who was knowingly allowed to use their land in such a fashion.

II. A COMMON CARRIER ENGAGED IN THE TRANSPORTATION OF LIVESTOCK FOR HIRE IS REQUIRED BY LAW TO MAINTAIN ADEQUATE FACILITIES AND CORRALS FOR THE HOUSING OF SAID ANIMALS SO AS TO PREVENT THEIR ESCAPE AND INJURY TO THIRD PARTIES.

Section 422 of the Agricultural Code of California provides that a common carrier who transports livestock for hire may not lawfully confine said livestock in cattle cars for more than thirty-six hours ". . . without unloading for rest, water and feeding into

properly equipped pens for a period of at least five hours".

A similar statute exists in 45 U. S. Code Ann., Sections 71 and 72, requiring that said animals be transported not more than twenty-eight hours continuously and thereafter unloaded in properly equipped pens for rest, water and feeding.

In *Mering v. Southern Pacific Company,* 161 Cal. 297, it was provided that while an owner may agree to accompany livestock or care for them this does not relieve the railroad from providing adequate feed, water and properly equipped pens for their resting and feeding. Obviously implied in said decision is the further duty (which is a joint duty) to see that the animals are so properly secured in the pen as to prevent their escape and injury to the general public.

In 13 Corpus Juris Secundum, Carriers, Sec. 43, it is provided that the pens or corrals provided by common carriers for hire for the maintaining of livestock must be constructed and maintained in such a state of efficiency as is reasonably calculated to prevent animals from escaping therefrom and the failure to fulfill this duty in this regard will render the carrier liable for loss or injuries sustained thereby. See *Texas Railway Company v. Bigham,* 28 Southwestern 162, and *Texas & N.O.R. Company v. Lide,* 144 Southwestern 2d 685. In *Brook & Olson v. Payne,* 181 Northwestern 803, it was provided that this duty of maintaining adequate corrals for the prevention of the escape of the animals is imposed by law upon the railway company regardless of the fact that the ship-

per retains control and management of the stock until reloading is commenced.

Most cases which have arisen concerning the escape of livestock, involve a fact situation in which the owner of the livestock is suing the railroad company for damages to the animals caused by their escape. However, a collateral line of cases, together with the cases previously cited, indicate a duty of law upon a carrier for hire to prevent livestock in carriage from escaping and injuring third parties. The duty is not delegable.

A railroad is liable for negligence of third parties to whom it seeks to delegate the duty of operating its transportation facilities or any part thereof and this rule applies even though such delegation may be approved by the Interstate Commerce Commission. Thus the duty of safely corraling livestock is also not delegable.

The transportation of the animals in question was continuous transportation involving the operation of the corrals and the feeding and watering of the animals. This was an intrinsic part of the transportation process and one required by law both under the Agriculture Code of California and the U. S. Code. Thus liability existed as to that company for the damage occasioned by the escape of the animals.

It was said in 3 Shearman on Negligence, Section 447, that *"railroad companies have no power to lease their roads or delegate their public duties without express statutory authority; and therefore a company who attempts to do so remains liable for injuries suffered*

through the negligence of anyone operating any part of its road without its consent".

The following cases have held a railroad liable where it is attempted to delegate its public duties:

Seay v. Southern Railway Company, 208 S.C. 171, 37 Southeastern 2d 535;

Los Angeles & S.L.R. Company v. Umbaugh, 61 Nevada 214, 123 Pac. 2d 224;

Missouri Pacific Railroad Company v. Newton, 205 Arkansas 353, 168 Southwestern 2d 812;

Clifford v. New York Central, 97 New York Supp. 954.

It has been held under 45 U.S. Code Ann., Section 72, that a carrier cannot by any contract with a shipper relieve itself of the duty of feeding and watering animals. (See *Southern Railway Company v. Prado,* 3 Alabama App. 413, 57 Southern 513.) It has also been held that it is the duty of a carrier to provide a place where stock can be cared for in all kinds of weather. (See *International E. G. N. Railway v. McRae,* 82 Texas 614, 18 Southwestern 672.)

In *Los Angeles & S. L. R. Company v. Umbaugh,* supra, it was held that the rule applied even when the Interstate Commerce Commission approved the delegation. The Agricultural Code and U.S. Code, which provides the duty of a railroad engaged in transporting livestock for hire to provide adequate pens and corrals, were obviously enacted to provide for the care of the animals and the preservation of the animals *and also were enacted to preserve and*

protect the general public from the animals brought into inhabited areas. Obviously, livestock pens and corrals are maintained by railroads in numerous cities and urban areas. To say that a railroad may bring into such cities and urban areas, or adjacent to main highways and thoroughfares, large numbers of livestock and upon arrival at said points that the railroad company has no further liability would be a construction so foreign to common sense as to render the purpose of the statutes ineffective and without purpose.

If a railroad company is being paid to transport large numbers of animals and livestock, it is obvious that they must maintain safe corrals for the holding of said livestock while in shipment or following termination of shipment so as to protect the public at large from the straying or wandering of said livestock.

If this Court is to apply the rule adopted by the lower Court in this case, then a railroad company can bring in large shipments of wild bulls and horses and deposit them at any place in the town and have no further liability therefor. Carrying the ruling of the lower Court to the ridiculous point, a shipper could have two carloads of Brahma bulls shipped with a terminal point of San Francisco. At that point the railroad company could open the doors of the boxcars, release the Brahma bulls upon the streets, and have no further liability, contending that as soon as they arrive at the terminal point of shipment the liability rests with the owner of the animals. Obviously, neither the federal nor the state legislatures intended any

such construction of the law, but intended that the railroad company would hold said livestock in safe pens and corrals pending their removal or reshipment therefrom or pending their trans-shipment or continuation of shipment to some other point.

III. A COMMON CARRIER TRANSPORTING LIVESTOCK FOR HIRE IS REQUIRED TO EXERCISE REASONABLE CARE WHILE SAID ANIMALS ARE IN THE PROCESS OF SAID CARRIAGE TO SEE THAT THEY DO NOT ESCAPE AND INJURE MEMBERS OF THE PUBLIC AT LARGE.

In this action there was a continuity of transit of the two carloads of mules from Texarkana, Texas, to Santa Rosa, California. (See Plaintiff's Exhibits Nos. 17 and 18 in evidence.) The defendant has sought to place great emphasis on the fact that the termination of the shipment occurred at Sacramento at the very moment the mules arrived at Sacramento and at that moment Southern Pacific was absolved from all further responsibilities for the animals. This contention has been answered in paragraphs I and II above.

The law is clear in this case, applying the facts herein, that there was a continuity of transport. The evidence demonstrates that (1) the animals were held for diversion; (2) that they were diverted on the same livestock contract and waybill upon which they arrived; (3) that the destination point on the waybills was Santa Rosa, California, and that no transportation charges were paid until the animals arrived in Santa Rosa; (4) no receipt or certificate was given

by the consignee of the animals for the animals until they had arrived at Santa Rosa; (5) that the boxcars on which the animals had originally been shipped from Texarkana were held in Sacramento at the corrals and subsequently the animals continued in transit from Sacramento in the same boxcars and arrived in Santa Rosa in the same boxcars, at which time the payment for freight was made and the animals receipted for; (6) that state and federal laws require periodic feeding and resting of the animals in transit in that said animals, under federal law, may not be transported for more than twenty-eight hours and, under state law, for more than thirty-six hours, without such rest and feeding; (7) that plaintiff's exhibits Nos. 17 and 18 demonstrate that the animals were last rested in Barstow, California, on December 15, leaving there at 2:10 a.m. and arriving in Sacramento on December 16, at 10:30 a.m. Thus, thirty-two hours had elapsed in the shipment from Barstow to Sacramento and, under federal and state laws, the animals had to be removed at Sacramento for rest and feeding.

The trial Court sought to block all such evidence as to the number of hours elapsing between the shipment from Barstow and arrival at Sacramento on the alleged grounds that the evidence was immaterial. In fact, the evidence was most material to establish that, under federal and state laws, the animals were removed at Sacramento to comply with state statutes of feeding and resting. Therefore, that the animals were in the care, custody and control of Southern Pacific Company for resting and feeding in compli-

ance with state and federal laws pending the continuation of shipment to Santa Rosa, California, pursuant to the waybills of lading.

To establish the fact that there was continuous transit of the animals, an examination of parallel cases under the Commerce clause of the Constitution involving taxing authority will be helpful to the Court. In *Philippine Refining Corporation v. Contra Costa,* 24 Cal. App. 2d 655, the plaintiff and taxpayer imported coconut oil, placing the oil in tanks in Contra Costa County; the oil was then broken down into smaller lots for shipment to purchasers. The question before the Court was whether the oil thus temporarily stored was subject to local taxation. It was held that ". . . the oil was held . . . *solely for a purpose incidental to the transportation* . . . and that such allegation shows continuity of transit . . ."

Obviously, the animals in this instance were held for a purpose incidental to transportation, that is to say, for rest and feeding pending the continuation of the trip to Santa Rosa and that there was, therefore, continuous transit. Being a continuous transit, the animals were in the care and custody and control of the common carrier that was transporting those animals for hire, Southern Pacific Company. That company was ultimately paid for the shipment at Santa Rosa, California, and a receipt for the animals was signed by the owner at Santa Rosa. Therefore, the animals which escaped from the Southern Pacific corrals at Sacramento, injuring the appellant, were under the care, custody and control of Southern Pacific

Company and they are therefore liable for the damages sustained by the appellant through the negligent care of the animals, and their subsequent escape.

Section 1714 of the Civil Code of California establishes responsibility for straying livestock. That section provides:

> "*Responsibility for willful acts, negligence, etc.* Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the inquiry upon himself. The extent of liability in such cases is defined by the title on compensatory relief."

In construing that section in *Jackson v. Hardy,* a 1945 case, decided in 70 Cal. App. 2d 6, the specific issue was raised as to whether that section applied to those who owned or possessed cattle. In *Jackson v. Hardy* the Court held that

> "changed conditions compel adoption of a rule different from the common law rule. There is no reason for excepting cattle owners from the same duty applicable to other people to use ordinary care of skill in the management of their property. (Citing Civil Code, Sec. 1714.) It clearly appears from this decision that a cattle owner who negligently fails to keep his cattle from straying upon a highway may be held liable in a civil action for damages arising from a collision with his livestock even at a point where the highway is unfenced in open range country."

The law of California is thus clear that, whether the highway is fenced or unfenced, under provisions of Section 1714 of the Civil Code, an owner or possessor of cattle or livestock is required to exercise reasonable care to prevent those animals from straying upon a highway and colliding with automobiles. In *Galeppi Bros. v. Bartlett,* 120 Fed. 2d 208, cattle escaped and were on the highway and were struck by plaintiff's car. The defendant sought to have the Agriculture Code, Section 423, construed to the effect that an owner of cattle no longer has a duty to exercise reasonable care to keep the animals off the highway. The Federal Court stated that the amendment to the Agriculture Code only abolished the doctrine of *res ipsa loquitor,* but that, if in fact the owner was negligent in allowing the animals to stray upon the highway, the owner would therefore be liable for any damages which might result. In the *Galeppi Bros.* case the language of *Jackson v. Hardy* was quoted.

Thus, under California law, an owner of livestock or a person who possesses livestock has a duty of care to prevent the livestock from straying upon a highway and causing injury, and that, if the owner or possessor of such animals is negligent in his care and custody of the livestock, he is liable for the damages occasioned by virtue of that negligence.

The defendant and the trial Court relied heavily upon the case of *Rutherford v. Reilly,* 104 Cal. App. 2d 629. Upon the basis of this case the trial Court found, and the defendant below maintained, that it had absolutely no duty of any kind or character to

maintain, possess or control the livestock in question so as to prevent the same from escaping and injuring the public at large. In the *Rutherford* case Mr. Reilly boarded his horse with the Sleepy Hollow Riding Academy; under his bailment and agreement he had the right to take the horse out of the barn at any time. On one occasion, while he was removing his horse from the barn for the purpose of riding said horse, the horse was frightened and escaped from him, got onto a highway and was struck. The Court held that Reilly was liable as the owner of the horse and in control of the horse at the time it escaped, but that there would be no liability on the bailee with whom the horse had been boarded. The Court found as follows;

> ". . . it is plain that Reilly was entitled to exclusive possession of the horse from the moment he opened the stable door and that the position of the academy as bailee thereupon ceased".

It is presumptively the position of the defendant and the lower Court that the defendant was powerless to exercise any control over the livestock being held on its property and in its corrals. It is hornbook law that the land owner has control and authority in such a situation. It has been stated in Prosser on Torts, Hornbook Series, page 608, that the land owner's possession and control of his land gives him a power of control over the conduct of those whom he allows to enter upon it and which control he is required to exercise for the protection of those outside. Thus, Mr. Perine, in charge of the Southern Pacific corral and

an employee of the Southern Pacific Company, had the authority and power to require Mr. Coon to return the horses and mules to the inside wooden corral at 10:00 a.m. and 4:00 p.m. on the day of the accident, when he personally observed all of the animals outside the corral, adjacent to a public road, and in the control of only one person. It was not only the right but the duty of Mr. Perine, in order to protect the public at large, to require that the horses and mules be returned to the wooden corral or order Mr. Coon to remove all of the animals from the land owned by Southern Pacific Company.

The *Rutherford* case is not in point, being distinguished on *two* grounds. First, the *Rutherford* case did not involve the question of a nondelegable duty of a railroad but involved only the duty of a stable-keeper bailee. Secondly, the question of negligent permissive use (Restatement of Torts, Sec. 318) was not an issue in the *Rutherford* case, since there was no showing in the *Rutherford* case that the stable-keeper had *knowledge* of the horse owner's negligence in removing the horse from the stable. In the case at bar, however, the evidence clearly demonstrated that a Southern Pacific employee observed the mules being fed outside of the corrals (on Southern Pacific land) along a public road and that said employee did nothing to cause the mules to be returned to the corrals where they could be safely held in restraint.

In the case at bar, 55 horses and mules were being transported for hire by a common carrier which is re-

quired by law to maintain adequate corrals and fences and to feed, water and rest the animals periodically. Said animals were in the process of being shipped from Texarkana, Texas, to Santa Rosa, California. That the said animals were being held in the pens and corrals of the Southern Pacific Company as an incident to their transportation. That the animals had been in constant transit from Barstow, California, to Sacramento, California for 32 hours previous to their being unloaded in Sacramento, and, under existing federal and state laws, they were required to be unloaded in Sacramento and to be fed, watered and rested by the railroad company. *That the duty of transportation and resting and feeding of said livestock was a nondelegable duty of the railroad, regardless of whether the owner assisted in this capacity. The animals escaped from the corrals and upon the public highway while under the care, custody and control and while being in the process of shipment by the defendant railroad company. That no freight was paid nor was a receipt given for the animals until they had arrived at Santa Rosa, California.*

It is submitted that the fact situation existing in the case at bar is entirely distinct and the duties of law are entirely distinct from the fact situation existing in *Rutherford v. Reilly.*

IV. THE FINDINGS OF FACT ARE UNSUPPORTED BY THE EVIDENCE.

Paragraph III of the Findings of Fact (Trans. of Rec. p. 45) provides in part as follows:

> ". . . and at all times mentioned in this action, said stock corral was constructed and maintained with reasonable care."

This finding of fact is not supported by any evidence. Mr. Perine, the Southern Pacific employee assigned to the corral, testified that a two-strand and, in some places, a one-strand wire fence had been strung on the Southern Pacific land outside the corral but within the area in which the 55 horses and mules were being fed on the day of the accident. The testimony of Mr. Perine demonstrated that said fence was sagging and was not adequate.

Mr. Sigmund A. Fisher, the freight agent of Southern Pacific Company, in Sacramento and the person directly charged with the responsibility for the maintenance of the corral, testified that the inadequate wire fence outside of the wooden corral, on the Southern Pacific land and within which enclosure the animals were being fed on the day they escaped, had existed on the Southern Pacific land for some five years and was an inadequate fence and did sag in places, and that animals could escape therefrom.

Mr. Don Courtney, who resided in the area and was familiar with the corrals, testified in detail as to the one- and two-wire strand fence on Southern Pacific Company's land and the fact that said fence was inadequate, sagged in places and animals could escape therefrom. Mr. Courtney testified that the animals were held within this inadequate enclosure the day that they escaped.

Officer George Houck testified that his inspection of the Southern Pacific corral the day following the accident disclosed a skimpy, inadequate wire enclosure with the wires sagging.

The evidence of the Southern Pacific employees, of the independent witness, Mr. Courtney, of the independent witness, Officer Houck, all demonstrate that the corral wire enclosure maintained by the Southern Pacific on its land for more than five years and within which area the animals were being fed the day of their escape, was wholly inadequate, sagging and could easily be negotiated by the horses and mules that wished to escape. Therefore, finding No. III is not supported by the evidence.

Finding No. IV (Trans. of Rec. p. 45), is not supported by the evidence. That finding provides that the mules were consigned to Sacramento, California. Plaintiff's exhibits Nos. 17 and 18 conclusively demonstrate on the face thereof that the animals were consigned for shipment to Santa Rosa and that said animals were receipted for in Santa Rosa. The consignee did not receipt for the animals in Sacramento. Further, the testimony of Sigmund Fisher, freight agent of Southern Pacific Company, demonstrates that the freight was paid through to Santa Rosa.

It is submitted, therefore, on the face of the waybills of lading (plaintiff's exhibits Nos. 17 and 18) that finding No. IV is not supported by the evidence.

Finding No. V is similarly unsupported by the evidence upon the same grounds and reasons assigned to finding No. IV.

Finding No. VI is not supported by the evidence in that it provides that H. S. Coon was the owner of said animals and further provides that Mr. Coon had exclusive custody of and possession of the animals. Further, the finding is not supported by the evidence in that it provides that, until 4:30 p.m. on December 18, 1954, Southern Pacific Company had no possession and/or control of said horses and mules but that, to the contrary, the sole and exclusive care, custody and control, ownership and maintenance was with the owner, to-wit, H. L. Coon. Finding No. VI is not supported by the evidence since the waybills of lading and the uniform livestock agreement definitely establish that the animals were owned by Charles Owens and were consigned to H. L. Coon, and were being transported by the Southern Pacific Company. A finding which provides that Mr. Coon took sole and exclusive custody and possession thereof is not supported by the evidence. Upon arrival of the animals in Sacramento, pending further shipment to Santa Rosa, Southern Pacific employees assisted in the unloading thereof, a counting of the animals, and did, on two occasions the following day, go to the corrals to observe the animals and see to their needs. That, when knowledge that the animals had escaped came to the attention of Southern Pacific Company, they dispatched employees to assist in rounding up the animals and returning same to the corrals of the Southern Pacific Company. That the mules which were killed in the accident were ordered by Southern Pacific employees to a reduction plant in the name of Southern Pacific Company. That freight charges were

charged on the animals for continuous shipment from Texarkana, Texas, to Santa Rosa, California. That a receipt for the delivery of said animals was not given until the animals arrived in Santa Rosa, California. The said finding No. VI is likewise contrary to law in that, as a matter of law the Southern Pacific Company possessed and controlled said animals both as a common carrier transporting said animals for hire and as the owner of land upon which the said animals were being held.

Finding No. VII (Trans. of Rec., p. 46) is not supported by the evidence in that it provides that the mules were in the exclusive care, custody and control of Coon and that the defendant Southern Pacific Company was not negligent in any way concerning the escape of said animals. This finding is not supported by the evidence in that it conclusively was demonstrated by the testimony of Anthony Perine, that he had, on the day of the accident, observed the animals being fed outside the wooden corrals on Southern Pacific land within a wire enclosure that was wholly inadequate and which sagged. That he took no steps of any kind to see that the animals were returned to the corral and that he had further knowledge of their being negligently held on the land of the Southern Pacific Company within two hours of the happening of the accident. That the failure of Southern Pacific employees to correct this negligent care of the animals on Southern Pacific land within two hours of the happening of the accident, (having express knowledge that the wire enclosure was inadequate to restrain the animals) is sufficient evidence of

negligence on the part of the Southern Pacific Company to render finding No. VII erroneous.

It is submitted for the reasons hereinabove assigned and upon the basis of the law previously stated that the Findings of Fact herein specified are not supported by the evidence, nor are they supported by the legal duty imposed upon a common carrier or upon an owner of land.

It is respectfully submitted that the decision of the lower Court is void for the reasons that no jurisdiction existed in said Court to try this cause and that this Court is respectfully urged to remand the cause to the District Court with an order to remand same to the Superior Court of the State of California. Further, it is respectfully urged that, if jurisdiction is found to have existed, that the decision of the lower Court should be reversed on the grounds that it is erroneous as a matter of law and that the Findings of Fact are not supported by the evidence. That this Court declare that liability exists on the part of Southern Pacific Company and remand the case with instructions to try the case on the sole issue of damages sustained by plaintiff.

Dated, San Francisco, California,
January 8, 1957.

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